Court of Appeals, State of Michigan

ORDER

National Concrete Construction Assoc v Walbridge Aldinger Co

Docket No. 269482

LC No. 04-060980-CK

Alton T. Davis
Presiding Judge

William B. Murphy

Bill Schuette
Judges

The Court orders that the November 2, 2006 concurring opinion is hereby AMENDED. The opinion contained the following clerical errors:

On p. 3, Section IV, last line of paragraph 3:

The word "Hull" should be italicized and the word "exists" should be inserted so that the last sentence reads as, "The *Hull* Court simply did not repudiate its holding that a contract will not be implied when an express contract exists."

In all other respects, the November 2, 2006 concurring opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 05 2007
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

NATIONAL CONCRETE CONSTRUCTION ASSOCIATES, Plaintiff-Appellant, v WALBRIDGE ALDINGER COMPANY, Defendant-Appellee.	UNPUBLISHED November 2, 2006 No. 269482 Oakland Circuit Court LC No. 04-060980-CK

Before: Davis, P.J., and Murphy and Schuette, JJ.

SCHUETTE, J. (*concurring*).

I agree with the conclusions and result reached by my distinguished colleagues in the majority that defendant is entitled to summary disposition on all three of plaintiff's counts. However, I disagree with the legal analysis and approach utilized by my colleagues concerning plaintiff's unjust enrichment claim. Therefore, I write separately to state my agreement with the trial court's determination that the express contract between the parties foreclosed any unjust enrichment claim by plaintiff.

I. UNJUST ENRICHMENT AND QUANTUM MERUIT

At the outset, it is important to note that plaintiff has never raised the issue of quantum meruit. Rather, plaintiff's claim was for unjust enrichment. The majority opinion places great emphasis and relies on the decision in *Keywell and Rosenfeld v Bithell*, 254 Mich App 300; 657 NW2d 759 (2002) to suggest that the doctrines of "quantum meruit" and "unjust enrichment" are interchangeable because both theories have identical elements and standards. Nowhere does *Keywell* suggest that the two theories are identical.[1] Further, even if the two theories *were* identical, plaintiffs would not bother to plead each one individually, as happens in countless

[1] In fact, *Keywell* states that "[t]he firm's breach of contract and quantum meruit claims depended on the jury finding that a contract, either an hourly fee agreement or a contingent fee agreement, existed. ***In contrast***, the firm's claim for unjust enrichment depended on the jury finding that no express contract--that is, no fee agreement--existed between K & R and the Bithells." *Keywell, supra* at 328 (emphasis added).

actions. *See, e.g., Quality Products and Concepts Co v Nagel Precision*, 469 Mich 362, 366; 666 NW2d 251 (2003).

Moreover, the two doctrines are defined differently. "Quantum Meruit" is defined as "[t]he reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship." Black's Law Dictionary (2d ed, 2004). "Unjust Enrichment," on the other hand, is defined as "[t]he retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected." *Id*. Importantly, the two definitions do not cross-reference one another as synonyms. However, as discussed below, even if the two doctrines are interchangeable, the final result is the same.

II. THE CONTRACT IS NOT VOID OR UNENFORCEABLE

We all acknowledge that "[a] contract cannot be implied in law while an express contract covering the same subject matter is in force between the parties." *HJ Tucker and Assoc, Inc v Allied Chucker and Engineering Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999), lv den 461 Mich 949 (2000). This a correct statement of Michigan law. Yet we must not overlook the fact that Michigan law also states that when the elements of unjust enrichment have been shown, "the law operates to imply a contract in order to prevent unjust enrichment." *Barber v SMH (US) Inc*., 202 Mich App 366, 375; 509 NW2d 791 (1993) (citations omitted and emphasis added). Further, under Michigan law, "a contract will be implied ***only*** if there is no express contract covering the same subject matter." *Id*. (emphasis added). The majority suggests that if a contract is deemed to be void or unenforceable, then the above stated principle does not apply. However, that proposition is inapplicable in this case because the contract at issue here was ***not deemed to be*** void or unenforceable.

III. RECENT MICHIGAN LAW CONTROLS

While the majority opinion is thoughtful and thorough, I also disagree with the majority's analysis of the "implied contract" issue. The majority opinion suggests the decision in *Allen v McKibbin*, 5 Mich 449 (1858) permits "flexibility regarding quantum meruit recovery where there was a breach of the express contract, even by the plaintiff." *Id*. at 454. While *Allen* may not have been expressly overruled and even though it was once cited fifty years ago in *Antonoff v Basso*, 347 Mich 18, 32; 78 NW2d 604 (1956), I remain skeptical of its applicability to the case at bar and its value in an implied contract analysis.

Antonoff involved a cause of action in assumpsit, an equitable remedy along the lines of unjust enrichment, which is at issue here. *Id*. at 20.[2] However an action in assumpsit is also called "implied contract." *Garcia v McCord Gasket Corp*, 201 Mich App 697, 714; 506 NW2d

[2] Assumpsit is defined as "[a]n express or implied promise, not under seal, by which one person undertakes to do some act or pay something to another . . . [a] common law action for breach of such a promise or for breach of a contract . . . ." Black's Law Dictionary (8th ed 2004).

912 (1993). This Court held in *Garcia* that "an action [for assumpsit] is a suit ***for obligations implied or imposed by law*** to repay money paid or expended by one person for the use or benefit of another who ought to have paid it to a third person, independent of any instrument in writing requesting such payment or promising repayment." *Id*. (emphasis added).

The parties in *Antonoff* had an ambiguous agreement about which the trial court heard parol evidence in order to imply the contract in fact. *Antonoff*, *supra* at 27-28. It was this implied contract that our Supreme Court discussed when it implemented the policy that a plaintiff may still recover in equity. It is imperative, however, to note that the Court in *Antonoff* was dealing with ***an implied contract*** and not an express contract, as exists in the case at bar. Therefore, the *Antonoff* analysis has no application to the facts and circumstances of this case.

On the other hand, of significant applicability to this matter is the decision rendered by our Supreme Court in *Farm Bureau Mut Ins Co v Buckallew*, 262 Mich App 169, 183; 685 NW2d 675 (2004), *rev'd on other grounds*, *Farm Bureau Mut Ins Co v Buckallew*, 471 Mich 940; 690 NW2d 93 (2004) . In *Farm Bureau*, the plaintiff and defendant entered into a wrongful death settlement, evidenced by an express agreement. *Id*. at 177. The terms of that contract were clear and unambiguous. *Id*. at 178. The plaintiff, however, argued that if the agreement were not rescinded or reformed, the defendants would be unjustly enriched. *Id*. at 182-83. In denying plaintiff's argument, this Court stated that "[i]f applicable, the law implies a contract to prevent unjust enrichment." *Id*. at 183. This Court reasoned that plaintiff's argument was flawed in part because "a contract will be implied only if there is no express contract covering the same subject matter." *Id*. In that case, there was an express contract, and it did cover the same subject matter—the wrongful death settlement between the plaintiff and defendant. *Id*.

IV. *HULL* IS NOT OUT OF CONTEXT

This Court has consistently ruled that it will not imply a contract when an express contracts exists. *See*, *e.g.*, *Hull & Smith Horse Vans, Inc v Carras*, 144 Mich App 712, 716; 376 NW2d 392 (1985); *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003) (a contract will be implied under unjust enrichment only if there is no express contract governing the parties); *King v Ford Motor Credit Co*, 657 Mich App 303, 327-28; 668 NW2d 357 (2003) (a contract will not be implied under the doctrine of unjust enrichment where a written agreement governs the parties' transaction).

The majority contends that the decision in *Hull* was inartfully phrased thereby limiting its applicability to the case at bar. I disagree.

Following its statement that "quantum meruit as a theory of recovery is inapplicable where an express contract exists," this Court proceeded to state in *Hull* that it was just as inappropriate to imply a contract where the price had been imposed by law as it is when an express contract exists. *See id*. The Hull Court simply did not repudiate its holding that a contract will not be implied when an express contract

V. CONCLUSION

Michigan Courts have consistently refused time and time again to imply a contract where

an express contract exists between two parties. I agree with my distinguished colleagues in the majority that plaintiff is not able to recover under an unjust enrichment theory because plaintiff has not suffered any inequity. However, as discussed above, that question need not even be reached, as the doctrine of unjust enrichment is not available to plaintiff in the first instance.

I would affirm the trial court's reasoning on all grounds.

/s/ Bill Schuette